A

Saw Seng Eng v Lembaga Bandaran Kudat

B HIGH COURT (KOTA KINABALU) — CASE NO BKI-22NCVC-55/8 OF 2021
LIM HOCK LENG J
1 JULY 2024

C *Tort — Trespass — Trespass to land — Construction of concrete jetty on private land — Whether concrete jetty built when registered proprietor already entitled to possession of land — Whether concreate jetty an illegal structure — Whether there was intentional encroachment on private land — Whether permanent structure built on a private land should be treated as part of land — Whether ownership of structure built on land vested in registered proprietor — Land Ordinance (Sabah) (Cap 68) s 4*

D

E *Local Government — Local authority — Duties of local authority — Construction of concrete jetty on private land — Whether concrete jetty constructed with approval of relevant authorities — Whether jetty served public purpose — Whether there was encroachment on private land — Whether jetty ought to be demolished*

F The plaintiff was the registered proprietor of a parcel of land in Kudat which was by the sea and held under Town Lease 057506288. The plaintiff had applied for the land on 10 July 2003. He occupied the land under temporary occupation licences ('TOLs') since 2009. The land was eventually alienated by the Jabatan Tanah dan Ukur ('JTU') to the plaintiff, and the title deed for the
G land was issued to him on 8 November 2019. The defendant, a local authority, had constructed a concrete jetty on the land which caused others to use it despite his demands for the structure to be dismantled and removed. This led to the plaintiff suing the defendant for trespass. The plaintiff contended that: (a) the defendant's concrete jetty was an illegal structure constructed without
H the approval of the statutory bodies responsible for the establishment, operation and maintenance of jetties, ports and harbours, as well as the regulation of the waterways in Sabah; and (b) the use of the concrete jetty was obstructive to vessels around the area. On the contrary, in its counterclaim, the defendant argued that: (i) 'the defendant's jetty was built legally long before the
I title deed for the said land was registered and the defendant's jetty was used for public purpose'; (ii) there had never been any complaints from a statutory body about the jetty since it started operations in the 1990s; (iii) the recent complaints were an afterthought; and (iv) the plaintiff had misled the JTU. Hence, the defendant sought for declarations that: (A) the plaintiff had

wrongly and unconscionably applied for the land, although he was aware that the defendant's jetty served a public purpose; (B) a declaration that the alienation of the land to the plaintiff was unlawful; and (C) an order that the issuance of Town Lease 057506288 be set aside.

Held, allowing the plaintiff's claim for trespass, dismissing the defendant's counterclaim:

(1) While the plaintiff had applied for the land on 10 July 2003 and the defendant had subsequently applied for the land on 8 January 2009, it was clear that the land applications did not create or confer on any applicant any rights over the land. The director of the Jabatan Tanah dan Ukur had the discretion to alienate land to such applicant as he considered appropriate, including the plaintiff. The defendant's complaint that the land was unlawfully alienated and the title deed was wrongly issued, as well as the insinuation that the premium was too low, must be given short shrift as the director of the Jabatan Tanah dan Ukur was not named as a party to the action herein and had not been given the opportunity to be heard. In any case, the court was not seised of original jurisdiction. The matters raised by the defendant so far as they relate to the decision of the director of the Jabatan Tanah dan Ukur to alienate the land to the plaintiff could only come before the court on appeal under s 41(1) of the Land Ordinance (see paras 10–13).

(2) The defendant's complaint that it was wrong of the plaintiff to apply for the land, when he knew of the jetty's existence on it was misconceived and misleading. In the first place, the concrete jetty was not in existence when the plaintiff applied for the land on 10 July 2003. The concrete jetty was only built in 2019, a time when the plaintiff was already entitled to possession/occupation, albeit under a TOL. It was trite that an intentional encroachment on land to which the plaintiff was entitled to possession was actionable as a trespass, even if it was done in the mistaken belief of a right of entry (see paras 14–15 & 29).

(3) By its letter dated 23 April 2023 addressed to the plaintiff, the defendant stated that it had no objection to the extension of the plaintiff's TOL until the title deed for the plaintiff's land application could be issued. Hence, it did not lie in the defendant's mouth to seek sympathy by saying that the locals of Kudat were now deprived of the use of the concrete jetty built on the plaintiff's land, and that the Federal Government funds would be wasted. The defendant had only itself to blame. Further, the reliance of the defendant on purported equitable rights was misplaced. If at all, it was the defendant which was estopped from questioning the plaintiff's proprietary and possessory rights as the registered owner. In the

circumstances, the plaintiff had made out his case of trespass against the defendant whose counterclaim was dismissed (see paras 30–31, 33 & 39–40).

(4) While the Minister of Local Government may exercise a certain degree of control over a local authority in Sabah, a local authority such as the defendant here was nonetheless a separate entity. Section 7 of the Local Government Ordinance, the equipollent provision of s 13 of the Local Government Act 1976 made this clear. Similarly, a local authority did not fall within the interpretation of 'government' in s 2 of the Government Proceedings Act 1956. Hence, an order was thus granted for the defendant to demolish the concrete jetty it had constructed on the plaintiff's land and to remove all structures, materials and debris on the said land and to reinstate that part of the said land to its original condition within six months, failing which the defendant should pay the plaintiff the actual, reasonable costs for the said demolition and said reinstatement (see paras 60 & 65).

[Bahasa Malaysia summary

Plaintif adalah pemilik berdaftar sebidang tanah di Kudat yang terletak di tepi laut dan di bawah Pajakan Bandar 057506288. Plaintif telah memohon tanah itu pada 10 Julai 2003. Beliau menduduki tanah itu di bawah lesen pendudukan sementara ('TOL') sejak 2009. Tanah itu akhirnya dipindahkan oleh Jabatan Tanah dan Ukur ('JTU') kepada plaintif dan surat ikatan hak milik tanah itu dikeluarkan pada 8 November 2019. Defendan yang merupakan pihak berkuasa tempatan, telah membina jeti konkrit di atas tanah itu yang menyebabkan orang lain menggunakannya struktur itu diarahkan untuk dibongkar dan dialihkan. Ini menyebabkan plaintif menyaman defendan kerana menceroboh. Plaintif berhujah bahawa: (a) jeti konkrit defendan adalah struktur haram yang dibina tanpa kelulusan badan berkanun yang bertanggungjawab untuk penubuhan, pengendalian dan penyelenggaraan jeti, pelabuhan serta pengawalseliaan laluan air di Sabah; dan (b) penggunaan jeti konkrit menghalang kapal di sekitar kawasan itu. Sebaliknya, dalam tuntutan balasnya, defendan berhujah bahawa: (i) 'jeti defendan dibina secara sah lama sebelum surat ikatan hak milik untuk tanah tersebut didaftarkan dan jeti defendan digunakan untuk tujuan awam'; (ii) tiada sebarang aduan daripada badan berkanun mengenai jeti sejak ianya mula beroperasi pada tahun 1990-an; (iii) aduan baru-baru ini adalah pemikiran selepas itu; dan (iv) plaintif telah mengelirukan JTU. Oleh itu, defendan memohon pengisytiharan bahawa: (A) plaintif telah memohon tanah itu secara salah dan tidak wajar, walaupun dia sedar bahawa jeti defendan adalah untuk tujuan awam; (B) pengisytiharan bahawa pemberimilikan tanah kepada plaintif adalah menyalahi undang-undang; dan (C) perintah bahawa pengeluaran Pajakan Bandar 057506288 diketepikan.

Diputuskan, membenarkan tuntutan plaintif untuk pencerobohan, mengenepikan tuntutan balas defendan:

(1) Walaupun plaintif telah memohon tanah itu pada 10 Julai 2003 dan defendan kemudiannya memohon tanah itu pada 8 Januari 2009, adalah jelas bahawa permohonan tanah tidak mewujudkan atau memberikan kepada mana-mana pemohon sebarang hak ke atas tanah tersebut. Pengarah Jabatan Tanah dan Ukur mempunyai budi bicara untuk memberikan tanah kepada pemohon yang difikirkannya sesuai, termasuk plaintif. Aduan defendan bahawa tanah itu telah diberikan secara tidak sah dan surat ikatan hak milik telah dikeluarkan secara salah, serta mengatakan bahawa premium terlalu rendah, haruslah tidak diberi pertimbangan kerana Pengarah Jabatan Tanah dan Ukur tidak dinamakan sebagai pihak dalam tindakan di sini dan tidak diberi peluang untuk didengar. Walau apa pun, mahkamah tidak mengambil alih bidang kuasa asal. Perkara-perkara yang dibangkitkan oleh defendan setakat yang berkaitan dengan keputusan Pengarah Jabatan Tanah dan Ukur untuk memberikan tanah itu kepada plaintif hanya boleh dibawa ke hadapan mahkamah dalam rayuan di bawah s 41(1) Ordinan Tanah (lihat perenggan 10–13).

(2) Hujahan defendan bahawa adalah salah plaintif untuk memohon tanah itu apabila mengetahui kewujudan jeti di atasnya merupakan satu salah faham dan mengelirukan. Pertamanya, jeti konkrit tidak wujud apabila plaintif memohon tanah itu pada 10 Julai 2003. Jeti konkrit hanya dibina pada 2019, yang mana plaintif sudah berhak untuk pemilikan/pendudukan walaupun di bawah TOL pada ketika itu. Adalah menjadi undang-undang mantap bahawa yang plaintif boleh diambil tindakan sebagai pencerobohan untuk pencerobohan yang disengajakan ke atas tanah yang dimilikinya, walaupun ianya dilakukan dengan kepercayaan yang salah tentang hak masuk di tanah tersebut (lihat perenggan 14–15 & 29).

(3) Melalui suratnya yang bertarikh 23 April 2023 yang ditujukan kepada plaintif, defendan menyatakan bahawa mereka tidak mempunyai bantahan terhadap pelanjutan TOL plaintif sehingga surat ikatan hak milik bagi permohonan tanah plaintif dikeluarkan. Oleh itu, defendan tidak boleh mengatakan bahawa penduduk tempatan Kudat kini dilucutkan penggunaan jeti konkrit yang dibina di atas tanah plaintif dan dana Kerajaan Persekutuan akan dibazirkan. Semua ini adalah salah defendan sendiri. Selanjutnya, pergantungan defendan pada hak ekuiti tidak boleh dipertahankan. Sekiranya ada, defendan yang dihalang daripada mempersoalkan hak proprietari dan pemilikan plaintif sebagai pemilik berdaftar. Dalam keadaan itu, plaintif telah membuktikan kes pencerobohannya terhadap defendan yang tuntutan balasnya ditolak (lihat perenggan 30, 31, 33 & 39–40).

(4) Walaupun Menteri Kerajaan Tempatan boleh menjalankan tahap kawalan tertentu ke atas pihak berkuasa tempatan di Sabah, pihak berkuasa tempatan seperti defendan di sini merupakan entiti yang berasingan. Seksyen 7 Ordinan Kerajaan Tempatan, peruntukan yang serupa dengan s 13 Akta Kerajaan Tempatan 1976 menjelaskan perkara ini. Begitu juga, pihak berkuasa tempatan tidak termasuk dalam tafsiran 'Kerajaan' dalam s 2 Akta Prosiding Kerajaan 1956. Oleh itu, perintah telah diberikan kepada defendan untuk merobohkan jeti konkrit yang telah dibina di atas tanah plaintif dan diarahkan untuk membuang semua struktur, bahan dan serpihan di tanah tersebut dan untuk mengembalikan bahagian tanah tersebut kepada keadaan asalnya dalam tempoh enam bulan, sekiranya gagal defendan harus membayar plaintif kos sebenar yang munasabah untuk perobohan tersebut dan pengembalian semula tanah tersebut (lihat perenggan 60 & 65).]

Cases referred to

Abdul Aziz bin Mohamed Ginan & 108 Ors v Datuk Bandar Kuala Lumpur [2007] 3 MLJ 12, HC (refd)

Bandar Utama City Corporation Sdn Bhd v Datuk Bandar, Majlis Bandaraya Petaling Jaya [2015] MLJU 2385; [2016] 6 CLJ 576, HC (refd)

Burhan Ating & Ors v Director of Lands & Surveys & Ors [1992] MLJU 116; [1992] 2 CLJ Rep 211, HC (refd)

Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor and another suit [2009] MLJU 1858; [2012] 1 LNS 896, HC (refd)

Chua Sai Ngoh (F) v Beh Ai Meng [1955] 1 MLJ 167; [1955] CLJU 20; [1955] 1 LNS 20 (refd)

Datuk Bandar Kuala Lumpur v Abdul Aziz bin Mohamed Ginan & Ors [2007] 4 MLJ 346, CA (refd)

Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor [2020] 5 MLJ 185; [2020] 9 CLJ 192, FC (refd)

Government of Malaysia v Lim Kit Siangunited Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12, CA (refd)

IOI Corporation Bhd v Gemencheh Granite Sdn Bhd [2015] MLJU 2386; [2015] 10 CLJ 332, HC (refd)

Johandra Realty Sdn Bhd dan satu lagi lwn Ketua Pengarah Jabatan Pengairan dan Saliran Malaysia dan satu lagi [2021] 2 MLJ 738; [2021] 2 CLJ 485, CA (refd)

Maikal bin Hashim (suing for himself and as the representative of the other co-owners of nt 123026102) v Chai Nang Yung [2018] MLJU 2146; [2018] 1 LNS 2259, HC (refd)

R Meyyanathan a/l Retnasamy v Dewan Bandaraya Kuala Lumpur [2024] 10 MLJ 733; [2024] 1 CLJ 570, HC (refd)

Rethnasamy v Teoh Ngoo Mooi & Anor [1983] 1 MLJ 344; [1982] CLJU 82, HC (refd)

Ronald Philip Devereux & Anor v Majlis Perbandaran Langkawi Bandaraya

Pelancongan & Ors [2012] 4 MLJ 665; [2013] 3 CLJ 287, HC (refd)
Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188; [2015] 8 CLJ 1173, FC (refd)
Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607; [2009] 2 MLRA 659, CA (refd)
Terence Garnica & Anor v Maldu Hashim & Anor [2022] CLJU 3142, HC (refd)
Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd [2006] 6 MLJ 24; [2006] 8 CLJ 657, HC (refd)
The State Government of Sabah & Ors v Clarence Chiuh Ken Loong & Ors [2017] 3 MLJ 127; [2017] 2 CLJ 379, CA (refd)
Veerasingam a/l Subramaniam & Ors v Datuk Bandar Kuala Lumpur [2012] 8 MLJ 479, HC (refd)
Yap Ea Teck v Yang Dipertua Majlis Daerah, Kota Tinggi, Johor [1995] MLJU 55, HC (refd)

Legislation referred to

Government Proceedings Act 1956 ss 2, 29
Land Ordinance (Cap 68) ss 4, 6, 9, 12, 41, 41(1), 88
Land Rules r 2
Local Government Act 1976 ss 13, 18
Local Government Ordinance 1961 ss 7, 14, 37, 50
Ports and Harbours Enactment 2002 (No 5) ss 2, 5, 14(1)
Specific Relief Act 1950 s 54, 54(d)

Irwin Chang (Lind Willie Wong & Chin) for the plaintiff.
Sonny Durai (Allion Kitingan & Partners) for the defendant.

Lim Hock Leng J:

THE PARTIES AND THE DISPUTE

[1] The plaintiff is the registered proprietor of a parcel of land in Kudat which is by the sea, and held under Town Lease 057506288. The land measures 7,621.4sqm more or less.

[2] The plaintiff had applied for the land on 10 July 2003. He occupied the land under temporary occupation licences ('TOLs') since 2009.

[3] The land was eventually alienated by the Jabatan Tanah dan Ukur to the plaintiff, and the title deed for the land was issued to him on 8 November 2019.

[4] He sued the defendant, the local authority, for trespass, for constructing

a concrete jetty on the land, and causing others to use it despite his demands for the structure to be dismantled and removed.

[5] In his suit, the plaintiff also averred that the defendant's concrete jetty was an illegal structure constructed without the approval of the statutory bodies responsible for the establishment, operation and maintenance of jetties, ports and harbours, as well as the regulation of the waterways in Sabah. In addition, the plaintiff took the position that the use of the concrete jetty was obstructive to vessels around the area, in particular the ro-ro ramp nearby.

[6] The crux of the defendant's case appears to be that 'the defendant's jetty was built legally long before the title deed for the said land was registered and the defendant's jetty is used for public purpose,' and the natives of Kudat were using the defendant's jetty which was built with funds obtained from the Federal Government in 2019. The defendant pleaded that the premium was a mere RM76,500.

[7] The defendant argued that there had never been any complaints from a statutory body about the jetty since it started operations in the 1990s, and that the recent complaints are an afterthought.

[8] The defendant further argued that the plaintiff had misled the Jabatan Tanah dan Ukur.

[9] By its counterclaim, it sought a declaration that the plaintiff had wrongly and unconscionably applied for the land although he was aware of the defendant's jetty which served a public purpose, a declaration that the alienation of the land to the plaintiff was unlawful, and an order that the issuance of Town Lease 057506288 be set aside.

EVALUATION OF THE EVIDENCE AND FINDINGS

[10] While the plaintiff had applied for the land on 10 July 2003 and the defendant had subsequently applied for the land on 8 January 2009 it is clear that the land applications do not create or confer on any applicant any rights over the subject land (see s 12 of the Sabah Land Ordinance and r 2 of the Sabah Land Rules, and the decision of the Court of Appeal in *The State Government of Sabah & Ors v Clarence Chiuh Ken Loong & Ors* [2017] 3 MLJ 127; [2017] 2 CLJ 379).

[11] The director of the Jabatan Tanah dan Ukur has discretion to alienate land to such applicant as he considers appropriate, including the plaintiff, subject only to the direction of the state cabinet (see s 9 of the Land Ordinance).

[12] The defendant's complaint that the land was unlawfully alienated and the title deed was wrongly issued, as well as the insinuation that the premium was too low, must be given short shrift as the director of the Jabatan Tanah dan Ukur is not named as a party to the action herein and has not been given the opportunity to be heard (see the decision of the Federal Court in *Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor* [2020] 5 MLJ 185; [2020] 9 CLJ 192).

[13] In any case, the court is not seised of original jurisdiction. The matters raised by the defendant so far as they relate to the decision of the director of the Jabatan Tanah dan Ukur to alienate the land to the plaintiff could only come before the Court on Appeal under s 41(1) of the Land Ordinance (see *Burhan Ating & Ors v Director of Lands & Surveys & Ors* [1992] MLJU 116; [1992] 2 CLJ Rep 211).

[14] The defendant's complaint that it was wrong of the plaintiff to apply for the land — when he knew of the jetty's existence on it — is misconceived and misleading.

[15] In the first place, the concrete jetty was not in existence when the plaintiff applied for the land on 10 July 2003. The concrete jetty was only built in 2019. The evidence shows that only a wooden jetty which had fallen into disrepair was on the land.

[16] Next, and this is of some importance, a person who builds a permanent structure on state land — which was the status of the land before it was alienated to the plaintiff — runs the risk that he will incur the time and expense in putting up the structure in vain, in the event the state evicts him or the director alienates the land to another person. By s 4 of the Land Ordinance,'land' includes '(d) all things attached to the earth or permanently fastened to anything attached to the earth, whether on or below the surface ...' The jetty would thus be treated as part of the land, the ownership of which is vested in the plaintiff (see also *Chua Sai Ngoh (F) v Beh Ai Meng* [1955] 1 MLJ 167; [1955] CLJU 20; [1955] 1 LNS 20, and *Rethnasamy v Teoh Ngoo Mooi & Anor* [1983] 1 MLJ 344; [1982] CLJU 82).

[17] Further, the jetty, be it in its present concrete form or in its previous iteration as a wooden jetty, is an illegal structure and also obstructive to vessels making use of the adjacent ro-ro ramp.

[18] In this regard, reference is made to two letters from Jabatan Pelabuhan dan Dermaga Sabah ('JPDS'), a statutory authority established by the Ports and Harbours Enactment 2002 to control and regulate traffic by water in ports and harbours, and waters within the limits of Sabah. As highlighted by learned

counsel for the plaintiff, s 2 defines harbours to include jetties while s 5 states that the director of JPDS has a duty to control and regulate traffic by water with safety in mind.

[19] Both JPDS letters are dated 19 December 2022. One was addressed to the plaintiff. The other was addressed to the defendant, informing it that the jetty had not been approved and that the jetty could affect the operations and activities in the port area. The JPDS referred to s 14(1) of the Ports and Harbours Enactment 2002 which states that 'it shall not be lawful (a) to construct any structure in any port area or otherwise which may affect the traffic and safety of the navigation'.

[20] There was no approval for but rejection of the jetty by the LPPS. Felix bin Liangson (PW2), its former general manager who retired in 2022, referred to his letter dated 2 June 2021 which informed the plaintiff that the concrete jetty was too close to the ro-ro ramp and would obstruct boats and ferries docking there. An investigation revealed that the distance between the concrete jetty and the ro-ro ramp was only about 40metres. PW2 also referred to a LPPS letter dated 3 November 2021 stating that ferries and vessels would require a large area to manoeuvere and the concrete jetty which was obstructive would need to be demolished. PW2 further referred to a letter to him from Sabah Ports Sdn Bhd dated 9 November 2021. PW2 was informed that, following an investigation, the jetty was still being used though prohibition and warning signs were there. The evidence of Solibang bin Tanjong (PW3), a former planning and development manager of LPPS, was corroborative of PW2's evidence.

[21] The defence called Chong Chen Bin (DW2), the Assemblyman for Tanjung Kapor in Kudat, to give evidence that the ro-ro ramp is not in use. There was overall conflicting evidence on whether it was in use but the case does not turn on that point. That aside, it appears that the ro-ro ramp will be in use once the Kudat-Palawan ferry route is operational.

[22] Even if it is not in use presently, the concrete structure is unlawful since it has not been approved by JPDS.

[23] The non-approval of the concrete jetty by JPDS, LPPS and Sabah Ports Sdn Bhd was confirmed by Jasmin Lumbok (DW1), the defendant's assistant engineer. He agreed that the defendant did not obtain approval for the jetty from JPDS, or permission for it from the other two entities, both before and after its construction.

[24] Furthermore, even if the plaintiff had known of the concrete jetty or for that matter, the wooden jetty, at the time he applied for the land, such

knowledge is irrelevant as the plaintiff is the registered owner of the land. A

[25] Section 88 of the Land Ordinance provides that no claim to or interest in any land, except for land still held under native customary tenure without documentary title shall be valid until it has been registered. B

[26] In *R Meyyanathan a/l Retnasamy v Dewan Bandaraya Kuala Lumpur* [2024] 10 MLJ 733; [2024] 1 CLJ 570, a case concerning an action for trespass against the local authority maintaining a monsoon drain which it had built on the plaintiff's land, the Kuala Lumpur High Court held the plaintiff was entitled to succeed although he 'had bought the land with full knowledge of the location of the monsoon drain on his land'. C

[27] Learned counsel for the defendant cited the Federal Court's decision in *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188; [2015] 8 CLJ 1173 to argue that registration of the land in the plaintiff's name does not make the title indefeasible. The facts of that case are however materially different. There, a forged instrument of transfer vitiated the title. In the instant case, to recapitulate, subject only to the directions of the state cabinet, the director of the Jabatan Tanah dan Ukur has discretion to alienate land; and s 41 of the Land Ordinance makes it clear that this court has no original jurisdiction to adjudicate on the director's decision to alienate the land to the plaintiff. D E

[28] Learned counsel for the defendant also sought to distinguish *R Meyyanathan Retnasamy*, by arguing that the land was state land before it was alienated to the plaintiff and the wooden jetty was on state land long before the alienation. The argument is spurious as adverse possession or occupation confers no rights (see s 6, Land Ordinance). F

[29] It may be added that the concrete jetty was built at a time when the plaintiff was already entitled to possession/occupation, albeit under a TOL. It is trite that an intentional encroachment on land to which the plaintiff is entitled to possession is actionable as a trespass, even if it was done in the mistaken belief of a right of entry (see *Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd* [2006] 6 MLJ 24 at pp 25 and 33; [2006] 8 CLJ 657 at pp 665–666). G H

[30] The reliance of the defendant on purported equitable rights is misplaced in view of the various provisions in the Land Ordinance which were relied upon by the plaintiff. I

[31] If at all, it is the defendant which is estopped from questioning the plaintiff's proprietary and possessory rights as the registered owner. In this regard, learned counsel for the plaintiff identified various strands of evidence.

A **[32]** The defendant wrote to the assistant collector of Land Revenue, Jabatan Tanah dan Ukur on 12 October 2009, stating that it had no objection to the plaintiff's land application.

B **[33]** By its letter dated 23 April 2023 addressed to the plaintiff, the defendant stated that it had no objection to the extension of the plaintiff's TOL until the title deed for the plaintiff's land application could be issued.

C **[34]** Moreover, both DW1 and DW3 testified that the defendant had supported the plaintiff's land application on various occasions but sought to downplay or excuse the support.

D **[35]** In particular, DW3 had, on behalf of the defendant, attended the Mesyuarat Jawatankuasa Penggunaan Tanah held on 25 March 2010 and supported the plaintiff's land application.

E **[36]** Although DW3 in his witness statement averred that he would not have supported the plaintiff's land application had he known that the defendant's concrete jetty was on the land applied for, the court is unable to give the averment much credence since DW3 was in the employment of the defendant itself and should know about the location of the jetty put up by the defendant, more so when he was giving his support at a formal meeting.

F **[37]** Importantly, DW3 acknowledged that he had visited the land based on the plaintiff's land application before he supported it (see NOP, lines 2030–2038).

G **[38]** Similarly, DW1 tried to explain that he did not know that the concrete jetty was on the plaintiff's land. DW1's explanation is unacceptable as the scope of his job was to go through development and building plans. Indeed, DW1 even agreed that the defendant did not check on the availability of the subject land after it received the Federal Government grant. When it was put to him that the defendant should have checked, all DW1 could say was: 'Saya hanya terima arahan' (see NOP, lines 1465–1470).

H

[39] It does not lie in the defendant's mouth to seek sympathy by saying that the locals of Kudat are now deprived of the use of the concrete jetty built on the plaintiff's land, and that the Federal Government funds would be wasted. The defendant has only itself to blame.

I

CONCLUSION AND ORDERS

[40] Despite the valiant efforts of learned counsel for the defendant, for the reasons given, the court finds that the plaintiff has made out his case of trespass

against the defendant whose counterclaim is dismissed. A

[41] The plaintiff had abandoned prayer (a). In respect of prayer (b), it reads: 'An order that the defendant do forthwith demolish the defendant's jetty and removal all structures, materials and debris therefrom the said land following such demolition and to reinstate the that part of the said land to its original condition'. B

[42] The court was of the view that it was injunctive in nature, bearing in mind that s 54(d) of the Specific Relief Act 1950 provides that 'an injunction cannot be granted ... to interfere with the public duties of any department of any Government in Malaysia, or with the sovereign acts of a foreign Government,' while s 29 of Government Proceedings Act 1956 provides: '(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties ...'. C D

[43] The parties were invited to submit on the point. E

[44] The plaintiff argued that that prayer (b) is not an injunction in substance since it 'is clearly not a standalone matter but will only arise or become effective if the Plaintiff succeeds with his overall claim of trespass against the Defendant'. It is somewhat difficult to discern any logic in the argument. F

[45] The other argument put up by the plaintiff was that s 54(d) of the Specific Relief Act 1950 is inapplicable as prayer (b) does not prevent or restrain the defendant from discharging any of its public duties. While that may be so, the plaintiff did not deal with s 29 of the Government Proceedings Act 1956. G

[46] This court is mindful that in *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607; [2009] 2 MLRA 659, the Court of Appeal held: ' ... s 29 of the GPA does not permit the granting of any injunction against the government. Likewise, s 54 of the SRA *prohibits the grant of an injunction against any Malaysian government department'*. In so holding, the Court of Appeal referred to, inter alia, the majority decision of the Supreme Court *Government of Malaysia v Lim Kit Siangunited Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12. However, in those cases, the party sought to be injuncted was either the government itself or a government officer. H I

[47] Thus, ultimately, the issue here appears to be whether a local authority is to be treated as part of the government or a government department.

[48] In *Yap Ea Teck v Yang Dipertua Majlis Daerah, Kota Tinggi, Johor* [1995] MLJU 55, Abdul Malik Ishak J (as His Lordship then was) was of the view that a local authority is a government department. He explained his reasoning thus:

> By its very name 'Local Government Act, 1976 (Act 171)' one can easily identify the local authority as defined under s 2 thereof to be and to come within the scope of s 54(d) of the Specific Relief Act 1950 (Revised 1974) ie '... any department of any Government of Malaysia ...' and, consequently, perpetual injunction sought for against the President of MDKT should be dismissed forthwith with costs as it is barred by that section of the Specific Relief Act 1950 (Revised 1974). With respect, I do not subscribe to *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 for three simple reasons. Firstly, the President of MDKT is cited here by his office in his official designation as a defendant in this originating summons and by virtue of s 126 of the Local Government Act 1976 (Act 171) he is deemed to be a public servant within the meaning of the Penal Code and by necessary inference he is also governed by the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. As MDKT is a product of the Local Government Act 1976, it is a government department and remains so to this day.

[49] In *Veerasingam a/l Subramaniam & Ors v Datuk Bandar Kuala Lumpur* [2012] 8 MLJ 479, Zabariah J (as Her Ladyship then was) adopted the reasoning of His Lordship:

> [48] Further, local authority, like the defendant is a department of the Government of Malaysia (refer to *Yap Ea Teck v Yang Dipertua Majlis Daerah, Kota Tinggi, Johor* [1995] MLJU 55; [1995] 2 BLJ 157), which is subservient to the Minister charged with the responsibility for local government. As a government department, the defendant cannot be subject to an injunction, be it interim or perpetual (refer to the case of *Ganad Media Sdn Bhd v Dato' Bandar Kuala Lumpur (No 2)* [2002] 1 MLJ 508; [2002] 6 CLJ 6).

[50] At the other end of the spectrum, reference may be made to *Abdul Aziz bin Mohamed Ginan & 108 Ors v Datuk Bandar Kuala Lumpur* [2007] 3 MLJ 12. In that case, the plaintiffs were issued notices by the defendant to vacate and demolish their houses so as to make way for the DUKE highway project. The plaintiffs filed an inter partes application to restrain the defendant from demolishing their houses. Among the issues was whether the DUKE highway project was a government or private project, and whether the High Court could grant the injunction against the defendant. After holding that there was only slender evidence the project was a government project, Mohd Hishamudin J (as His Lordship then was) held:

> Now, the office of Datuk Bandar is established by s 4 of the Federal Capital Act 1960. His function is to administer the City of Kuala Lumpur. He is a corporation

sole by virtue of s 5(1) of the Federal (C)apital Act. He has his own legal personality independently of the government; and, independently of the government, he may sue and be sued. He may enter into contracts. He has a common seal. The Datuk Bandar is a local authority for the purposes of the Local Government Act 1976. The functions, powers and duties of the Datuk Bandar, as a local authority, are set out in the Federal Capital Act and, more extensively, in the Local Government Act. In my judgment, having examined the provisions of the Federal (C)apital Act and the Local Government Act, I take the view that the Datuk Bandar is a mere statutory authority, a local government; but it is not a department of the government like, say, the Road Transport Department, the Immigration Department, the Police Department or the Department of Customs and Excise. It is not a department of the Government for the purpose of s 54(d).

[51] While the case concerned the grant of an interlocutory injunction, as opposed to an injunction after trial as in the instant case, the reasoning of Justice Hishamudin, in holding that a local authority is not a government department, is compelling.

[52] Although the decision was reversed by the Court of Appeal, it was not because the defendant was considered a government department.

[53] Zulkefli JCA (as His Lordship then was), in delivering the judgment of the Court of Appeal, held: 'On the facts and circumstances of this case we are more inclined to hold the view that the balance of convenience should tilt more in favour of the defendant'. What the plaintiffs there claimed was compensation, not an interest in the land. Damages would be an adequate remedy.

[54] Also, the plaintiffs did not give any undertaking as to damages.

[55] In addition, the 'interim injunction pending trial which was granted by the learned judge would cause the DUKE project to be delayed or abandoned as the full trial would take some considerable time to be concluded' (see *Datuk Bandar Kuala Lumpur v Abdul Aziz bin Mohamed Ginan & Ors* [2007] 4 MLJ 346).

[56] Further support for the proposition that a local authority is not a government department can be found in *Bandar Utama City Corporation Sdn Bhd v Datuk Bandar, Majlis Bandaraya Petaling Jaya* [2015] MLJU 2385; [2016] 6 CLJ 576 where the matter received detailed and compelling analysis by Hanipah Farikullah J (now FCJ).

[57] Notably, s 13 of the Local Government Act 1976 provides that a local authority shall be a 'body corporate' and should have perpetual succession and

a common seal, and may sue and be sued, acquire, hold and sell property, generally do perform such and things as bodies corporate may by law do and perform.

[58] The court is mindful that the Local Government Act 1976 does not extend to Sabah. There is instead the Local Government Ordinance 1961 in Sabah, which has a similar provision vide s 13 which will be considered shortly.

[59] It was pointed out for the defendant that s 18 of the Local Government Act 1976 which deals with the superannuation or provident fund makes no provision for pensions for the employees of local authority employees, unlike government servants who receive pensions. Learned counsel for the defendant was also at pains to highlight certain provisions in the Local Government Ordinance 1961 by which the Minister of local government has and can exercise control over a local authority in Sabah, such as s 14 by which questions of membership of the local authority shall be referred to the Minister, s 37 which stipulates that a local authority may not enter into a contract exceeding a certain amount as may be directed by the state cabinet, and s 50 which stipulates that a local authority may make by-laws subject to the approval of the Minister.

[60] While the Minister of local government may exercise a certain degree of control over a local authority in Sabah, a local authority such as the defendant here is nonetheless a separate entity. Section 7 of the Local Government Ordinance — the equipollent provision of s 13 of the Local Government Act 1976 — makes this clear.

[61] It reads: 'Every Authority established under the provisions of this Ordinance shall be a body corporate having perpetual succession and a common seal and shall be capable in law of suing and being sued in its corporate title and of purchasing, holding and selling movable and immovable property'.

[62] In *Bandar Utama City Corporation Sdn Bhd v Datuk Bandar, Majlis Bandaraya Petaling Jaya* [2015] MLJU 2385; [2016] 6 CLJ 576, Justice Hanipah Farikullah held that the separate legal entity principles would be applicable. On that note, while the defendant in the instant case had highlighted the degree of control that the Minister has over a local authority, the defendant itself is a separate entity with its own seal, and was on its own able to defend and counterclaim on its own.

[63] Next, s 2 of the Government Proceedings Act 1956 which provides that 'government' includes the Federal Government and the Governments of the State. Justice Hanipah Farikullah took cognisance of the preamble which

provides that the legislation relates to proceedings by and against the Federal Government and the Government of the States. As such, it was not thought that the preamble in shedding light on the definition includes local authorities and '... it is emphatically not the province of the court to write into an Act of Parliament something which is not there'.

[64] It may be added that in *Ronald Philip Devereux & Anor v Majlis Perbandaran Langkawi Bandaraya Pelancongan & Ors* [2012] 4 MLJ 665; [2013] 3 CLJ 287, See Mee Chun JC (as Her Ladyship then was) similarly took the view that a local authority does not fall within the interpretation of 'government' in s 2 of the Government Proceedings Act 1956.

[65] An order was thus granted for the defendant to demolish the concrete jetty it had constructed on the plaintiff's land and to remove all structures, materials and debris on the said land and to reinstate that part of the said land to its original condition within six months from the date hereof, failing which the defendant shall pay the plaintiff the actual, reasonable costs for the said demolition and said reinstatement.

[66] Since time to mobilise and carry out the demolition is required, the prayer that the concrete structure be demolished forthwith is not appropriate. The defendant should be given time to do so. In the absence of evidence showing otherwise, a period of six months would be appropriate (see *Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor and another suit* [2009] MLJU 1858; [2012] 1 LNS 896).

[67] As for general damages, the plaintiff asked in closing submissions that 'the rental for the trespass be calculated at the rate of RM1,000 per day for approximately 0.25 acres from the date of issuance of the title deed, viz, 8 November 2019'. *Maikal bin Hashim (suing for himself and as the representative of the other co-owners of nt 123026102) v Chai Nang Yung* [2018] MLJU 2146; [2018] 1 LNS 2259; *IOI Corporation Bhd v Gemencheh Granite Sdn Bhd* [2015] MLJU 2386; [2015] 10 CLJ 332; and *R Meyyanathan Retnasamy* were cited.

[68] However, no evidence was adduced as to what might be the rental for the area occupied by the concrete jetty. It would be arbitrary in the circumstances to order a specific amount of general damages. In *Johandra Realty Sdn Bhd dan satu lagi lwn Ketua Pengarah Jabatan Pengairan dan Saliran Malaysia dan satu lagi* [2021] 2 MLJ 738; [2021] 2 CLJ 485, the Court of Appeal held that if the trespass causes a plaintiff actual damages, he will be entitled to such amount as will compensate him for his loss and, if there is no such evidence, a plaintiff who proves the trespass is nonetheless entitled to nominal damages (see also the decision of Celestina Stuel Galid J in *Terence*

A *Garnica & Anor v Maldu Hashim & Anor* [2022] CLJU 3142).

[69] This is not an appropriate case to order an assessment of damages which would otherwise have been considered, if the evidence were such that the trial would be unduly delayed for evidence of the damages to be adduced.

B

[70] Here, there was no impediment for liability and quantum to be considered at the same trial. The plaintiff had in fact submitted on the quantum of general damages, although no cogent evidence was led as to the appropriate quantum.

C

[71] To break up every trial to establish liability and quantum separately would not be making the best use of judicial time, and would also run up extra costs for the parties.

D

[72] The plaintiff was instead awarded nominal damages of RM5,000 and 5% interest thereon from the date of judgment until full settlement.

[73] Costs is a matter of discretion for the court. In this case, no order as to
E costs was made since the plaintiff did not plead and ask for costs in his prayers, and there was no omnibus prayer for further relief or other orders as may be deemed fit and just. The court also did not find it appropriate to order costs or aggravated damages, as the purpose of building the concrete jetty on land which the defendant had also applied for, was not for profit but to serve the
F local people, especially the fishermen of Kudat.

Plaintiff's claim for trespass allowed, defendant's counterclaim dismissed.

Reported by K Selvaraju

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H

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